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M. A. WRIGHT, COMPTROLLER GENERAL,
APPELLANT,

*vs.*

E LOUISVILLE & NASHVILLE RAILROAD
COMPANY AND

E ATLANTIC COAST LINE RAILROAD CO.,
APPELLEES.

*In the Circuit Court of Appeals.*

*For the Fifth Circuit.*

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## APPELLEES' STATEMENT OF THE CASE.

The Georgia Railroad and Banking Company and the Central Railroad and nking Company of Georgia were equal owners, as tenants in common, of e Western Railway of Alabama.

May 7, 1881, The Georgia Railroad and Banking Company leased its railroad perty, including its half interest in the Western Railway of Alabama, to illiam M. Wadley and his assigns, for a term of ninety-nine years. By dif- nt assignments the appellees have become the lessees, and were such when tax in question was demanded.

Said Western Railway of Alabama lies in the State of Alabama except one arter of a mile in the city of West Point, Georgia.

The two above named owners of said Railroad held the same without any rter or act of incorporation until the———day of 188— when they were orporated by the laws of Alabama under the name of The Western Railway Alabama Company. The property was divided into 30,000 shares of $100 h, and each owner received 15.000 of said shares, but the shares received The Georgia Railroad and Banking Company were covered by said Lease d enjoyed by the Lessees.

While The Georgia Railroad and Banking Company had leased all its perty, the same was returned in its name and by it to the Comptroller neral under the laws of Georgia for taxation.

The blank, annually furnished by the Comptroller General to The Georgia ilroad and Banking Company to be used in making its tax returns, contained ongst others, the following question, to wit: "Number of stocks and bonds ned by the company and value of all property not enumerated and value of ch?" In no other way than in furnishing these blanks did the Comptroller neral make any demand for taxes upon said fifteen thousand shares of stock til about the 25th day of May, 1901, when he specifically demanded of The orgia Railroad and Banking Company that it pay taxes on said shares of ck for the year 1900 to the State of Georgia, which said taxes so demanded ounted to between $7,000 and $8,000.

It is provided by the aforesaid Lease that whatever taxes are collectible on d stock during the entire term of the lease are payable by the lessees; or if same are lawfully collected from The Georgia Railroad and Banking Com- y, the lessees are bound to reimburse said last named company without deduction from the rent, which said lessees pay.

The stockholders in the Atlanta and West Point Railroad Company, T Georgia Railroad and Banking Company, The Augusta and Savannah Railro Company and in all corporations, which pay taxes upon their property to t State of Georgia, do not return their shares of stock for taxation.

The corporation, The Western Railway of Alabama, has regularly paid State and County taxes required of it in the State of Alabama.

The Comptroller General of the State of Georgia, on the failure of T Georgia Railroad and Banking Company to pay taxes for the year 1900 said 15,000 shares of stock, threatening to issue execution against said Co pany as the owner of said shares for said taxes, Appellees filed their bill agai him and also against The Georgia Railroad and Banking Company to enj the collection, alleging as to the last named defendant that it would either p the tax and call upon appellees to refund the same, or it would permit t leased property to be taken in execution and sold for payment of the same and thereupon applied for an injunction against both defendants.

On the hearing of the cause the Circuit Court granted the injunction a made the decree which is here appealed from.

## BRIEF AND ARGUMENT OF JOS. B. CUMMING, FOR APPELLEES.

It is not out of place to point out in the beginning of this Brief and Arg ment what propositions appellees do *not* assert.

They do not contend that double or duplicate taxation is illegal.

They do not contend that the legislature of Georgia has not the power tax corporate property and also the shares, into which the corporate proper is divided, in the hands of the shareholders; although perhaps the negative this proposition might be maintained in the light of the comparatively rece decision in the case of Sheibley vs. Rome, 107 Ga., 384.

They do not contend that there is any property in Georgia (other than th expressly exempted by the State Constitution) not liable to be taxed once.

Whenever authorities are cited in this Brief on the subject of double tax tion, they are offered for the purpose of assisting in reaching a conclusion the controlling question in the case on its merits, which question is:

Has any competent authority in the State of Georgia levied a tax on the shares of stock in the hands of the shareholders?

For its bearing on this question, is also the discussion in this Brief of t question of *situs*.

Also for its bearing on this main question is the discussion in this Brief the subject of *uniformity*.

### RULES OF CONSTRUCTION OF TAX ACTS UNFAVORABLE TO VIE THAT THE TAX HAS BEEN IN FACT LAID ON THESE SHARES.

### DOUBLE TAXATION.

The proposed tax is subject to all the practical and essential, though, acco ing to some authorities, not to the technical legal, objections, applicable to double tax. The feature which brings such taxation into disfavor in the

of the law, viz.: the fact that the same property bears directly or indirectly a double burden, is prominent in the proposed tax.

That the proposed taxation is double taxation, practically and essentially, cannot be doubted. The railroad in Alabama is valued at three million dollars. This property thus valued is divided into thirty thousand shares of one hundred dollars each, and these shares given to the citizens of Georgia. This process does not add a dollar to the property. Whatever may be the subtle and metaphysical distinction, which the books make between corporate property and the shares of corporate property, and whatever declaration the books may make that there are two properties and two distinct ownerships, the practical fact remains, that there is but one substance, and this practical fact is recognized by the State of Georgia as above indicated, and most distinctly in the Southwestern Railroad case; 64 Ga., 783.

The value taxed is $3,000,000.

The Alabama tax reaches this whole value. If the Georgia tax is levied, it is on the same value. It is not the case of the Alabama tax resting on the corporate property valued at $3,000,000 and the Georgia tax resting on *another* value of $3,000,000 in the shares. But there is but one value, and not two values of $3,000,000 each. In other words, here is a tax for six millions laid on a three million value; or, to express it in another way, it is two taxes laid on one value—that value being $3,000,000.

There is no natural merit in the reply, which may be made to the charge of double taxation, that the State of Georgia imposes but one tax and the State of Alabama imposes the other. The result is that *the citizen of Georgia*, the subject of the operation of the laws of Georgia, will pay a double tax, if his shares are taxed. A tax upon the corporate property in Alabama equalizes him with the Georgia stockholder, whose corporation is taxed in Georgia. At this point they are equal; but the moment his *shares* are taxed, he becomes the only doubly taxed citizen in the State. The tax upon his *property* is a tax upon *him*.

"The tax is a contribution required of the citizens by the State, and when it is measured, as to its amount, by the value or the productiveness of the property, is still a tax on the person, and there is a personal liability on the person assessed with the tax. The individual and not the property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax, with which the owner must be charged. The tax is imposed on the person of the owner on account of his ownership of the property."

Burroughs on Taxation, Sec. 7.
Rundell vs. Lakey, 40 N. Y., 513; 517.

The State of Georgia has always regarded the taxation of both the corporate property and the shares, representing the interest of the shareholders of such property, as double taxation.

In the Bank of Georgia vs. Savannah, Dudley, 132, a case reported before the creation of the Supreme Court, but cited with approval by standard writers on taxation, it was said: "It is a principle of common justice that the same property should not be twice burdened for the same tax; and consequently in construing general powers, bestowed on towns and cities to impose taxes, a construction ought not to be given, which should subject the property of a cor

poration to be twice taxed." This language was used in considering an enactment, the effect of which, if enforced, would have been to tax both the corporate property of the bank and the shares in the hands of the shareholders.

So also in its taxation of banks, owing to certain well known requirements of the National Bank Act, the State, in order to get a tax from said banks, must tax its own banks through the shares. Having done this, it leaves the banks otherwise untouched. Sec. 12 of Tax Act of 1900, Acts of 1900, pages 33-34. In this course the State departs from its general rule, which is to tax the *property* of corporations and to leave the *shares* untouched; but the departure emphasizes the policy of the State not to tax both.

See also Rome R. R. vs. Rome, 14 Ga., 275.

So also the State, dealing with the shares of domestic corporations generally, by question or otherwise only demands the return of shares for taxation, when *the corporate property itself does not pay taxes.*

See 33rd question, Tax Act of 1898, page 36.

The same view is taken by Courts in other jurisdictions.

## MASSACHUSETTS.

In Tremont Bank vs. Boston 1 Cushing 142, the Court, while sustaining the tax as valid by the express language of the Statute, declares that a tax on the real estate of a bank in addition to a tax on shares, whose value is made up in part by the real estate, is double taxation. The Court says on page 145: "It may be truly urged, that such a tax upon a bank effects a double taxation upon the capital stock, to the extent that it is invested in real estate; such capital being liable, at the same time, to an assessment as personal property, in the form of a tax upon the shareholders."

In Middlesex R. R. Co. vs. Charlestown, 8 Allen 330, where there was no express provision for double taxation, it was held that a tax by the City of Charlestown on the railroad company's property could not be sustained, for the reason that the value of the property thus taxed was included in the value of the shares, which were already taxed. The Court says, on page 333: "We think it very clear that the plaintiffs were not taxable for any personal property in the city of Charlestown. They are a corporation established by law for the purpose of constructing and working a horse railroad. The corporation has no residence. Its stockholders are liable to taxation upon their shares in the towns where they dwell. The value of the personal property owned by the corporation is included as a subject of taxation in the value of the shares; as in the case of banks, insurance companies, manufacturing corporations, and other railroads."

## NEW JERSEY.

In the case of The Belvidere Bank vs. Tunis, Collector, 23 New Jersey Law, 496, the tax act exempted from taxation "so much of the property of incorporated companies, represented by the capital stock thereof, as by virture of this act is taxed in the hands of the stockholders." The Court says, page 247. "It is perfectly clear that the capital stock in the hands of the stockholders repre-

sents the entire property of every incorporated company. All the property of the company goes to constitute the value of the stock, and upon the dissolution of the corporation, it all goes to the stockholders, in proportion to their respective shares."

## MARYLAND.

In the Tax cases, 12 Gill and Johnston, 117, the Tax Act of 1841 made very sweeping provision for taxing all property. An assessment was made upon the capital stock of the bank and also upon its real estate, including its banking house, furniture and fixtures, and various other houses and lots, which the bank held as proprietor. The assessments upon the bank were set aside, the Court holding "that the property of a bank, being represented by the shares therein, both cannot be taxed; and therefore, when the tax is imposed on the the shares in the hands of shareholders, the property of the bank, real or personal, cannot also be taxed."

Cases on this line could be multiplied quite indefinitely.

Taken at their fullest value, what is established by the views thus far contended for? Only this: that the taxation of corporate property and of the shares, into which it is divided, is in effect, actually and substantially double taxation; that in such cases the one only real taxpayer, the real and substantial owner of the property, the shareholder, pays two taxes on one value; and that Georgia distinctly recognines that fact.

But "we make out no conclusive case against a tax, when we show that it reaches twice the same property for the same purpose."

Cooley on Taxation, 223-4.

No tax is made illegal by showing that it is in effect double taxation.

But while no "conclusive" case is made against the tax by showing that it is in effect double taxation, progress is made in the direction of the proposition, that in fact no tax has been imposed in this instance. For "it has very properly and justly been held that a construction of tax laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute or by necessary implication. It is a fundamental maxim in taxation that the same property shall not be subject to a double tax, payable by the same party directly or indirectly."

Cooley on Taxation, 227.

"In the absence of constitutional restriction, double taxation is within the power of the State. Some constitutions, however, prohibit it. Whether double taxation is prohibited or not, if the language of the Statute imposing the tax is indefinite, the Courts will construe it in such a manner as to avoid that result—a construction which will subject property to double taxation not being permissible, unless required by the express words of the Statute or by necessary implication."

Such being the requirement of the law before double taxation can be imposed, I ask where is there any express enactment imposing a tax on these shares? The tax Act of 1898, under which this tax is claimed, has but one section, to-wit the first, which could have any bearing on these shares. It provides that the Governor, with the assistance of the Comptroller General, shall levy a tax "on all of the taxable property in this State." But it is conceded that this provision of the Act, or indeed any other enactment, does not reach shares of stock, where the corporation is itself taxed on its property. It is admitted that no shares, except bank shares—the bank's property not being taxed—are reached by this Act. Neither does the sweeping declaration of the Constitution reach these other shares for the practical purpose of levying a tax on them. For it is admitted of record, that the shares of domestic corporations are not taxed. This admission is not accompanied by any statement of the plaintiff in this case, the exceedingly vigilant and diligent Comptroller General, that the non-taxation of these shares is an oversight, an improper omission of duty. On the contrary it appears from the record that such non-taxation is the settled practice, and the practical construction of the tax law—constitutional and statutory—of the State. Indeed, Mr. Attorney General Wright, in his argument in the Circuit Court, declared that the taxation of these domestic shares would be "monstrous."

Whether it would be "monstrous" or not, as a matter of fact they are not taxed.

And yet there is quite as much law to tax them as there is for the taxation of the shares involved in this litigation.

The argument for the taxation of these shares is stated thus: The Constitution requires all the property in the State, except expressly exempted property, to be taxed. The mandate of the first section of the Tax Act of 1898 "to levy and assess * * * * * a tax * * * * * on all of the taxable property in this State" is sufficient "machinery" to bring in all property in this State. These shares are property in this State. *Ergo* there is law sufficient to tax them.

That is a simple argument and works very well for this particular case, if it embraces all the law of it. But why is it that it does not take in the shares of other corporations? There is no proposition of this simple argument that is not applicable to *them* also. They are property, they are personal property and they are attached to the persons of intra-territorial citizens. But it is notorious, and also in evidence in this case, that *they* are not taxed.

The explanation is that neither the constitution nor any other law of the State calls for *double* taxation. On the contrary the law of the land is that an express enactment is needed for double taxation, and here there is no such enactment.

Counsel for the Comptroller General recognize the necessity of differentiating the *status* of these shares from the *status* of those shares, which are admittedly not taxed by the laws of Georgia. They recognize the fact that this necessity extends to finding some law, applicable to the shares involved in this case and not applicable to the non-taxed shares. They claim to find it in the 30th of the questions propounded under the Tax Act. See Acts of 1898, page 30.

Said question is as follows: "How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?"

The position of counsel for the Comptroller General on this point in the case, stated somewhat after the manner of an algebraic problem, is this: The Constitution of the State and Tax Act of 1898, make up the law applicable to shares in domestic corporations, whose corporate property is taxed. The Constitution of the State and the Tax Act of 1898, plus question 30 of the Act of 1898, make up the law applicable to shares in foreign corporations, whose corporate property is taxed. Now eliminate the factors common to both propositions, for they cancel each other, and you leave the tax demanded in this case to rest on question 30 alone.

In view of the requirement that there must be express law, when it is sought to impose double taxation, is it conceivable that this substantial double taxation can rest on a mere question?

It is admitted by counsel for appellees that the purpose of these questions is to disclose the existence of taxable property; but it certainly will not be contended that a question *proprio vigore* can impose a tax on the person, of whom the question is asked. If question 30 has this force, so should any other one of the series. An examination of them will show that the potentiality claimed for them cannot exist. Question 2, for instance is: "The kind and value of property owned by the wife and minor children of the tax payer and not returned by the owner thereof?" This certainly does not levy a tax on the tax paying head of the family as to the things inquired about.

Again in question 15, the tax payer is called on to answer what *insolvent* notes he holds. It will certainly not be contended that this question imposes a tax on him for his insolvent notes. They may be property, but they have no value and have never been taxed in Georgia. The same is true as to question 15, which inquires as to *insolvent* accounts.

Again question 41, which is "give the names of defendants and the dates and amounts of the *fi fas* and the dates of your transfers," simply asks for information, the greater part of which has no bearing on the tax to be levied. Again, if the propounding of questions is to have the force which is claimed, then the legislature has abdicated in favor of the Comptroller General its sovereign power of taxation. For in Section 21 of the Tax Act of 1900, it has given him the fullest liberty of adding to or taking from the list of questions.

Acts of 1900, page 38.

The perversion of questions from their primary function of eliciting information as a basis for further action, and the erection of them into the force of express enactments imposing double taxation, is what the learned Attorney General has declared double taxation itself to be—simply "monstrous."

## UNIFORMITY.

The proposed tax is a glaring departure from the rule of uniformity and equal fair dealing toward the citizens of the State, which the letter and spirit

of its tax laws enjoin. The owner of shares of the Western Railway of Alabama is no more an owner of his shares than the owner of Atlanta & West Point Railroad shares is the owner of his. The shares of the Alabama Railroad are, even in the view of the Comptroller General, no more "in the State" of Georgia, when held by a citizen of Georgia, than are the shares of the Atlanta & West Point Railroad when held by a citizen of Georgia. The holder of the Atlanta & West Point shares pays no taxes. Why? Because the property which his shares represent, is taxed. The property of the Alabama Railroad is also taxed. Up to this point, the parallel between the two citizens of Georgia is complete; but here the lines diverge. Assuming that the tax paid by the Atlanta & West Point corporation is one per cent. and by the Western Railway of Alabama corporation the same, the citizen of Georgia shareholder in each suffers a dimunition of one per cent. from his dividend on that account. But that is the end of the loss to the Georgia citizen, holder of Atlanta & West Point stock; but the loss of his next door neighbor, Western of Alabama shareholder, must, as contended by the Comptroller General, be increased by the tax on the shares.

Now the uniformity and equality provisions of tax systems are the *citizen's* side of the problem. The Government's concern for itself is to raise a sufficient revenue: its concern for its *citizens* is to make the burden as far as practicable equal and uniform on each. It is for *its citizens* that it devises measures of uniformity and equality. The fact that its citizen is interested in industrial enterprises beyond its borders, furnishes no justification for treating *him* differently from any other citizen holding identically the same kind of property. Indeed its purpose to tax the shareholder of The Western Railway of Alabama looks as if the State of Georgia, in its greed for money, would seize its own defenseless citizen and by squeezing him collect taxes on property in another State. There is not a single difference between the holders of Atlanta & West Point shares and holders of the shares involved in this case but a State line. What sympathy will such a policy receive in a national court?

"Theoretically tax laws should be framed with a view to apportioning the burdens of government so that each *person* (J. B. C.) enjoying government protection shall be required to contribute so much as is *his* (J. B. C.) reasonable proportion, and no more. The tax law that comes nearest to accomplishing this is, in theory, the most perfect."

Cooley on Taxation, 164.

"Equality and justice are constantly to be aimed at."

Cooley on Taxation, 222.

## II.

Up to this point we have considered those principles of construction of tax laws from which, when applied to the facts of this case, the deduction may be drawn that the State of Georgia has not in fact levied a tax on these shares. We now proceed to point out some direct and positive reasons against such taxation—and first as to

## SITUS.

"It would seem to be an axiom that a State has no right to impose taxes upon persons or property beyond the limits of the State; its sovereignty extends no farther."

Burroughs on Taxation, Sec. 40.

"The true principle on which to declare whether personal property is liable to be taxed is the *situs* of the property."

Desty on Taxation page 60.

"As to real estate it has never been claimed that such property could be taxed by any State other than that in which it is situated. And the same rule seems to be applicable to personal property; but the difficulties arise in the application of the principle."

Burroughs on Taxation, Sec. 40.

This author in the last paragraph of the same section, after stating the general rule to be that chattels are taxed at their actual *situs*, without reference to the residence of their owner, says that there is some comflict of authority in reference (among other things) to stocks of corporations.

Burroughs on Taxation, Sec. 40.

"The power of taxation by any State is limited to persons, property or business within its jurisdiction."

Tappan vs. National Bank, 19 Wall, 490-499.

Authorities might be multiplied indefinitely to show the territorial limitations of the taxing power. The Constitution of Georgia provides for a property tax only on the property within "the territorial limit of the authority imposing the tax." The Tax Act of 1898, under which these taxes are sought, levies a tax only on the taxable property "in this State." Indeed the proposition is axiomatic.

The most obvious subject of taxation by Georgia laws is the real estate situate, lying and being in the State of Georgia. Another obvious subject of taxation by those laws is personal property, having a physical *situs* within the territory of the State, such as animals, vehicles, etc.

Not so obviously, but still unquestionably, *choses in action*, belonging to residents of Georgia, are subjects of taxation by those laws. They (choses in action) are incapable of physical *situs*. They are intangible, and the law not having the guide or test of actual physical situs, has long since settled arbitrarily that they attach to the person of the owner and are in comtemplation of law where the owner is.

Other personal property may have its situs in a jurisdiction other than that in which the owner of the property resides. It is then taxable in such other jurisdiction. This rule applies clearly to tangible personal property such as animals, vehicles and the like, capable of having an actual physical situs.

A vital inquiry in this case is to ascertain in what class or category are shares of stock of an incorporated company. Where is their *situs*? Is it with their owner or is it where the corporate property itself is?

Nowhere, I assert with some confidence, are shares deliberately designated *choses in action*. Instances may be found where Courts, dealing with the status of other property and not of shares of stock, have used in a general enumeration the phrase *choses* in action as applicable to bonds, promissory notes, open accounts, other evidences of indebtedness and shares of stock. In places also Courts have spoken of shares of stock as being in the "*nature* of *choses* in action." But it is doubted whether any Court has deliberately and on consideration so entitled them. Neither would it seem accurate to say that shares of stock are "intangible." The certificate, which is held by the owner as evidence of his ownership is in itself not intangible any more than is a deed evidencing the title of an owner to real estate. The property, of which the certificate is the evidence, is certainly not intangible—and herein is a marked difference betwen "mere choses in action" and shares, and the analogy between certificates and deeds is very close. Shares of stock seem to be different in some respects from any of the subjects of taxation above mentioned. They are in this respect *sui generis*. According to authority and established principles of law their *situs* can be fixed arbitrarily. Where this has not been done, where, as in the State of Georgia, there is no enactment direct or indirect on the subject, a Court, in seeking to ascertain the *situs*, should do so in such a way as to avoid injustice and oppression, which double taxation is virtually admitted to be, though it may be legal. The natural equities and the presumption against double taxation should incline the Court to let even slight legal reasons turn the scale in favor of the taxpayer.

No *enactment of the Legislature* of Georgia has ever fixed in Georgia the *situs* of shares of stock held by citizens of Georgia in foreign corporations.

The *Courts* of Georgia, so far as they have spoken at all on this subject, have indicated that the *situs* of such shares is in the jurisdiction where the corporate property is located.

In the case of Dearing vs. The Bank of Charleston, 5 Ga., 497, the property in dispute was certain shares of the stock of The Augusta Insurance & Banking Company, a corporation under the laws of Georgia having its principal office in Augusta. These shares had belonged to Peck, who to secure a debt owing by him to the Bank of Charleston, South Carolina, had transferred them to that Bank, which thus held the legal title. In a contention over these shares between the Bank and Dearing, a Georgia judgment creditor, the Court held, norwithstanding the legal title—equivalent to ownership—of the Bank of Charleston, that the *situs* of these shares was in the State of Georgia. See bottom of page 515."

The case of Wright, Comptroller General vs. the Southwestern R. R. Company, 64 Ga., 784, will be greatly relied on in this argument for establishing the proposition that the non-taxability of the shares in question is not an open question in Georgia, but for the present the case is cited as affecting the question of the *situs* of the stock. In effect and by the strongest implication it fixes the *situs* of such shares at the corporation's domicil. It does so when it uses the following language (see page 799.)

"Stock held by the Company in railroads without the limits of the State is not taxable here. Stock in a railroad is really but so many shares of its

property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

This case is further commented on at this point as furnishing a reply to the position taken by Counsel for the Comptroller General, to the effect that the case of Dunbar vs. Augusta, 50 Ga., 392 fixed the *situs* of shares of stock at the domicil of their owner.

The case just quoted from in 64 Ga., after the quotation above named, proceeds to draw the distinction between "bonds, notes and all other mere evidences of debt" on the one hand, and shares of stock on the other. After having just declared that shares of stock in a foreign corporation are not taxable in Georgia, the Court goes on to say that bonds, notes and all other mere evidences of debt "follow the *situs* of the creditor no matter where the debtor lives." For sustaining this proposition the Court cites Dunbar vs. Augusta, *supra*———thus limiting, in the most unmistakable way, the application of that case to "bonds, notes and all other mere evidences of debt." Indeed even a casual examination of the Dunbar-Augusta case will show that anything said in it about *stocks* is clearly *obiter*. The sole question involved in the case was liability or non-liability to taxation of certain *bonds*, held by Dunbar.

It has been said above that there is no legislative enactment in Georgia fixing the situs of shares of stock in an incorporated company. This, however, is not strictly true. The tax act of 1898, under which this tax is demanded, and previous tax acts for many years, fix the *situs* of shares of National Banks at the domicil of the Bank, although the shareholders themselves may be residents of other states.

In Tappan vs. Merchants' National Bank, 19 Wallace 490, the Court says on page 499:

"The power of taxation by any State is limited to persons, property or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicil. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located."

Again, speaking of the nature of National Bank shares, the Court says:

"Shares of stock in National banks are personal property. They are made so in express terms by the Act of Congress under which such banks are organized. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own."

It will be observed that in this case the Court says in effect, in the language first above quoted, that a "law"—not necessarily a statute—can separate such property from the person of the owner and give it a *situs* elsewhere. We claim that there is such "law" in Georgia, and that it is found in the rule of property laid down in 64 Ga. above cited.

In the case of Jellenik vs. Huron Copper Mining Company 177, U. S. 1, the Court decides clearly and unreservedly that shares in a Michigan corporation owned by a citizen and resident of Massachusetts have their *situs* in the State of Michigan.

It is true that this holding of the Court was made on a question of jurisdiction and not of taxation. It is also true that the Court says:

"Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State, is a question not presented in this case, and we express no opinion upon it."

I would remark in passing that the very fact that the Court feels called upon to say that the effect of the ruling on taxation is a question reserved, is very suggestive and significant of the idea that that question would inevitably arise in that connection.

Indeed the reasons given by the Court for fixing the *situs* of the shares for the purpose of jurisdiction are equally strong for fixing the taxing *situs*. After declaring that the shares are personal property, it uses this language:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicil of the Company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is the real owner."

Observe that this is substantially the language used by the Supreme Court of Georgia in the Southwestern Railroad case, when it laid down the rule of property as affecting taxation of shares.

It is well known to all, lawyers and laymen, who have dealings involving the transfer of shares of stock, that the corporation issuing the shares, in a very practical and substantial sense, holds them as trustee for the owners of the stock and their creditors. The corporation, as is well known, is responsible to both those classes that no improper transfer shall be made. The corporation passes upon the right of a person, occupying a representative relation to the shares—such as administrator—to transfer them. The process, by which in Georgia and elsewhere, the creditor of the shareholder seizes the shares, is served upon the corporation. All this implies possession of the shares by the corporation—that is to say, *situs* of the shares with the corporation.

*The question of the taxability or non-taxability of such shares not an open question in Georgia.*

In the case of Wright, Comptroller General vs. The Southwestern Railroad Company, supra, the Court on page 799 uses this language: "(a) Stock in the company's own road, held by itself, or in other roads in this State, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; *and stock held by the company in railroads without the limits of this State is not taxable here. Stock in a railroad is really only so many shares of its property and that property is real estate, for the most part at least, and taxable by the State in which the road is located.*"

But this deliverance by the Supreme Court of Georgia is attacked by the counsel for the Comptroller General on two grounds:

*First.* It is claimed that it was "a dictum of Judge Jackson," "was clearly not well considered at the time" and "was rendered on the preliminary injunction."

To this I reply: If counsel mean to imply that the question, passed upon by a unanimous Court through their mouthpiece Judge Jackson, was not directly involved in the case, and that this deliverance was a "dictum" in the sense of being *obiter dictum*, counsel is manifestly in error. It appears from the report of that case that the Comptroller General was seeking to levy a tax on *all* the prop-

erty of the railroad. This effort led to an injunction and to the marshalling of all the property of the railroad company and the submission to the Court of the question of the taxability of each kind of property. The Court says, on page 794: "The numerous questions made as to different parts of the road and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and other questions in respect to *other items of property in and out of the State* (J. B. C.), and in what degree and how connected with the road, *and whether liable or not to be taxed*, (J. B. C.), make the case complicated," etc.

Also the novel attack is made on this unanimous judgment of the Supreme Court of Georgia that it was rendered on an interlocutory injunction. The learned and experienced counsel of the Comptroller General will, on reflection, doubtless admit that the *law*, where there is no dispute as to the facts, is invariably settled in injunction cases on what they are pleased to speak of as a "preliminary injunction."

In the case under discussion the Court says on page 796: "We think that on the hearing complete relief should be afforded, and the whole matter be investigated *to ascertain precisely what property of the Company should be taxed and what should not be taxed* (J. B. C.) * * * and in order to facilitate the trial, or a settlement, if desired, before trial, *we will indicate our opinion in regard to these matters now.* (J. B. C.)

It is true that the Court says on page 801, "The views given above are merely indicative of what we now think, from our understanding of *this record as it now appears*" (J. B. C.) But the Court also says in conclusion, page 801: "It is ordered that on the hearing the case be tried on its merits, and that such issues be made as shall bring out the whole truth on the facts, and *the law as indicated above be applied to those facts* (J. B. C.) subject to be modified by the chancellor as *facts other than those in this record* (J. B. C.) may require."

It is not possible to conceive of authority more direct and unimpeachable for the proposition announced by the Court viz.: "*Stock held by the Company in railroads without the limits of this State is not taxable here.*"

There was but one conceivable way to break down this authority and that is not available to opposing counsel, for it does not in fact exist, viz: to show that the case went again to the Supreme Court, that on said second hearing that Court recalled its previous rulings, and that the Comptroller General has in fact taxed the shares which the Court in this "preliminary injunction" declared to be non-taxable. I respectfully, but confidently, challenge counsel to show all or any of these facts.

But it is said by counsel for the Comptroller General that the case of Wright, Comptroller General vs. Southwestern Railroad Company is no longer authority, for the reason that it was a case originating prior to the Georgia Constitution of 1877.

That case, as above stated, arose out of the effort of the Comptroller General to tax all the property of the Railroad Company. This effort was made under the Act entitled "An Act to Amend the Tax Laws of this State so far as the same relate to Railroad Companies, and to define the liability of such companies to tax, and repeal so much of the charters of each company respectively as may

conflict with the provisions of this Act, approved February, 1874." The first section of said Act is as follows:

"From and after the passage of this Act the Presidents of all the Railroad Companies in this State shall be required to return on oath annually to the Comptroller General the value of the property of their respective companies, without deducting their indebtedness, each class or species of property to be separately named and valued so far as the same may be practicable, to be taxed as other property of the people of the State."

This has been the law of Georgia ever since said Act was passed and is now to be found in Section 780 of the Code of 1895. So far as the subject of railroad taxation is concerned the Constitution of 1877 did not advance an inch beyond the Railroad Tax Act of 1874 just cited. The Constitution requires all the property of railroad companies in the State of Georgia to be taxed: the Act of 1874 makes the same requirement as thoroughly and unreservedly. There is no provision of law in Georgia now, constitutional or statutory, declaring what property of railroads should be taxed, which did not exist prior to the Constitution of 1877, and has not existed ever since the passage of the Act of 1874. The Constitution added nothing to the stringency and thoroughness of this Act. Then as now the presidents of railroad companies were required to return on oath to the Comptroller General the value of the property of their respective companies, each class to be separately named and valued, to be taxed as other property of the people of the State.

See Tax Acts of 1874-5-6.
Code of 1882, Sec. 826 a.
Code of 1895, Sec. 780.

Then as now the law of Georgia regarded shares, representing stock in incorporated companies holding lands or a franchise in or over lands, as personalty.

Code of 1873, Sec. 2211.
Code of 1882, Sec. 2237.
Code of 1895, Sec. 780.

Again, it is urged by Counsel for the Comptroller General that the case of Wright, Comptroller General vs. the Southwestern Railroad Company, *supra*, was decided at a time when the Legislature of Georgia under its then Constitution could have exempted any property it saw fit to exempt from taxation: but that the Constitution of 1877 has taken away that right from the Legislature.

This might be a pertinent argument against the decision, if the decision were cited in support of a claim of exemption from taxation, but such is not the case. The decision is cited, not as declaring or attempting to declare any property in Georgia exempt from taxation, but as laying down a rule of property, and declaring what is the *situs* of certain property, and as holding also, incidentally, that the taxation of corporate property and also the shares representing the corporate property is double taxation.

The case of Atlanta Building and Loan Association vs. Stewart Tax Collector, 109 Ga., 80; seems to be considered by Counsel for the Comptroller General as furnishing some support to their contention. Why, is not very apparent. The

decision announced propositions, not contested by Counsel for the railroad company, as to the liability of all property *in* the State of Georgia to taxation and as to the impotence of the Legislature to exempt such property from being taxed one time. But as to one of the controlling questions, viz.: *situs*, it is silent and not at all in conflict with previous Georgia authorities; while on another controlling question, that of the taxation both of corporate property and the shares, into which it is divided, its deliverance, so far as it makes any, is in favor of the contention of these appellees, when it says: "Possibly it may be competent to provide against taxing the shares of stock, where all the property which gives them value, has been taxed." But the Court then proceeds to declare that the decision is not to be taken as authority for or against that proposition. Indeed this decision has no bearing on the case at bar. It is properly disposed of by the learned judge of the Circuit Court, from whose judgment this appeal is taken. After quoting the first two head notes of the decision, Judge Newman says:

"What is thus stated in the head notes, and more elaborately in the opinion, is beside the exact question involved here, which is, whether the State, for purposes of taxation, treats the shares in a railroad corporation as property distinct and separate from that of the corporation which it represents. Unquestionably the effect of the decision of the Supreme Court of the State in Wright, Comptroller General vs. Southwestern Railroad Company, *supra*, is that the State does not so regard shares of stock in railroad corporations located without the State."

Again, "there is nothing whatever in this decision to the effect that the State treats shares of stock in corporations as separate and distinct from that of the corporation for purposes of taxation, when the corporation itself is taxed on the property which the shares represent."